Mohd Zukhairi Abd Ghapar (an infant suing through his father and next friend, Abdul Ghapar bin Saad) v Quek Chiam Kee

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–37 OF 2001
LOW HOP BING J
21 OCTOBER 2003

Tort — Negligence — Contributory negligence — Test of — Appeal against decision of trial court

Damages (Personal Injury or Death) — Personal Injuries — Contributory negligence — Apportionment of liability — Personal injury— Whether apportionment of liability fair, reasonable, justified and correct

The appellants ('the plaintiffs') appealed against the decision of the learned sessions court judge who found the first plaintiff and the defendant equally liable in a motor vehicle accident, and disallowed the plaintiffs' claim for special damages by way of hospital bills. The issue for the determination of the court was whether the apportionment of liability decided by the trial court was fair, reasonable, justified and correct.

Held, dismissing the plaintiffs' appeal with costs and affirming the sessions court judge's decision:

(1) The test of contributory negligence is based entirely on the conduct of the plaintiff in that particular accident or case and is the same as in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportionate to the age of the child. Where the issue is purely a question of deciding what is the right apportionment, if any, of blame on two persons when they are suddenly involved in a traffic emergency, it would not be possible for the appellate court to intervene and substitute a fresh finding instead of that which was found by the learned trial judge. On the facts and the law, the High Court judge was of the view that the conclusion arrived at by the trial court on the evidence adduced before it pertaining to the apportionment of liability was fair, reasonable, justified and correct (see paras 15, 18, 20–21); *Jeremiah v Lee Yew Kwai* [1966] 1 MLJ 59 followed.

(2) The meaning of the expression 'special damages' consists of out-of-pocket expenses, such as hospital bills, and the burden of proof based on the balance of probabilities in the evidence lies on the plaintiff. Since these hospital bills had already been fully settled by the second plaintiff's employer directly and the second plaintiff paid nothing for these items, they did not form part of the plaintiffs' out of pocket expenses and so the trial court is correct in dismissing the plaintiffs' claim for special damages, because to allow the special damages would result in a duplicity of claim by the plaintiffs or to award special damages which were not actually incurred by the plaintiffs (see paras

22–23); *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 followed.

[**Bahasa Malaysia summary**

Perayu-perayu ('plaintif-plaintif') telah merayu terhadap keputusan hakim mahkamah sesyen yang bijaksana yang mendapati plaintif pertama dan defendan sama-sama bertanggungjawab untuk satu kemalangan motor, dan tidak membenarkan tuntutan plaintif-plaintif untuk ganti rugi khas melalui bil-bil hospital. Persoalan untuk ditentukan oleh mahkamah adalah sama ada pembahagian liabiliti yang diputuskan oleh mahkamah perbicaraan adalah adil, munasabah dijustifikasikan dan betul.

Diputuskan, menolak rayuan plaintif-plaintif dengan kos dan mengekalkan keputusan hakim mahkamah sesyen:

(1) Ujian untuk kecuaian sertaan adalah berdasarkan keseluruhan perbuatan plaintif dalam kemalangan atau kes berkenaan dan adalah sama dalam kes seorang kanak-kanak seperti orang dewasa, diubahsuai hanya setakat tahap berjaga-jaga yang dijangkakan mestilah bersesuaian dengan umur kanak-kanak tersebut. Di mana persoalan adalah semata-mata persoalan untuk memutuskan pembahagian yang betul, jika ada, terhadap kesalahan dua orang apabila mereka tiba-tiba terlibat dalam satu kecemasan jalanraya, ia tidak mungkin untuk mahkamah perayu untuk campur tangan dan menggantikan satu penemuan baru yang bukan diputuskan oleh hakim perbicaraan mahkamah. Berdasarkan fakta-fakta dan undang-undang, hakim Mahkamah Tinggi berpendapat bahawa keputusan yang dibuat oleh mahkamah perbicaraan atas keterangan dikemukakan di hadapannya berkaitan pembahagian liabiliti adalah adil, munasabah, dijustifikasikan dan betul (lihat perenggan-perenggan 15, 18, 20–21) ; *Jeremiah v Lee Yew Kwai* [1966] 1 MLJ 59 diikut.

(2) Maksud ungkapan 'special damages' meliputi perbelanjaan out-of-pocket, seperti bil-bil hospital, dan beban bukti berdasarkan imbangan kebarangkalian dalam keterangan terletak atas plaintiff. Memandangkan bil-bil hospital telahpun diselesaikan oleh majikan plaintif kedua secara langsung dan plaintiff kedua tidak membayar apa-apa untuk butir-butir tersebut, ianya tidak membentuk sebahagian daripada perbelanjaan sendiri plaintif-plaintif dan oleh itu mahkamah perbicaraan adalah betul untuk menolak tuntutan plaintif-plaintif untuk ganti rugi khas, kerana untuk membenarkan ganti rugi khas akan mengakibatkan penggandaan tuntutan olah plaintif-plaintif atau untuk mengawardkan ganti rugi khas yang sebenarnya tidak terakru oleh plaintif-plaintif (lihat perenggan-perengan 22–23); *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 diikut.]

Notes

For cases on contributory negligence under personal injuries, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 501–508.

For cases on contributory negligence under tort, see 12 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 743–786.

Cases referred to

Abraham v Choo Jit Fung & Anor [1996] 1 MLJ 97 (refd)
Bridge v Grand Junction Ry (1838) 150 ER 1134 (refd)
Chan Peng Fook v Kan Pak Lee [1974] 2 MLJ 197 (refd)
Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)
Chong Sooi Chuen v Yuen Lai Chun [1988] 2 MLJ 443 (refd)
Cunningham v Harrison & Anor [1973] 1 QB 943 (refd)
Goh Leng Kwan v Teng Swee Lin & Ors [1974] 2 MLJ 5 (refd)
Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693 (refd)
Jag Singh (an infant) v Toong Foong Omnibus Co Ltd [1962] MLJ 78 (refd)
Jeremiah v Lee Yew Kwai [1966] 1 MLJ 59 (folld)
Kayser v London Passenger Transport Board [1950] 1 All ER 231 (refd)
Lai Yew Seong v Chan Kim Sang [1987] 1 MLJ 403 (refd)
Lee Tai Kau v Rajanderan Manickam [1995] 4 MLJ 163 (refd)
Liong Thoo v Sawiyah & Ors [1982] 1 MLJ 286 (refd)
Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant) [1994] 2 MLJ 187 (refd)
Nance v British Columbia Electric Ry [1951] AC 601 (refd)
Ngooi Kim Chong v Subramaniam a/l Maruthan & Anor [1990] 1 CLJ 799 (refd)
Ong Jin Choon v Lim Hin Hock & Anor [1988] 3 MLJ 137 (refd)
Passenger Transport Board [1950] 1 All ER 231 (refd)
R v Southern Canada Power Co [1937] 3 All ER 923 (refd)
Sam Wun Hoong v Kader Ibramshah [1981] 1 MLJ 295 (folld)
Samar binte Mansor v Mustafa Kamarul Ariffin [1974] 2 MLJ 71 (refd)
Tan Chwee Lian v Lee Ban Soon [1963] MLJ 149 (refd)
Tey Siew Goh v Tay Tian Soo [1965] 1 MLJ 21 (refd)
Tham Yew Heng & Anor v Chong Toh Cheng [1985] 1 MLJ 408 (refd)
Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor [1994] 2 MLJ 497 (refd)

Legislation referred to

Evidence Act 1950 s 73A

Appeal from: Summons No 53–300 of 1998 (Sessions Court, Melaka)

Francis Soh (Jerald Gomez & Assoc) for the plaintiffs.
Azizan Abd Malik (Yacob & Rakan-Rakan) for the defendant.

Low Hop Bing J:

APPEAL

[1] This is an appeal by the appellants ('the plaintiffs') against the decision of the learned sessions court judge who on 28 June 2001 found the

first plaintiff and the defendant equally liable in a motor vehicle accident, and disallowed the plaintiffs' claim for special damages by way of hospital bills amounting to RM25,000 ('the special damages').

[2] The appeal was also against the award of interest.

FACTS OF THE CASE

[3] The first plaintiff was a 12-year-old boy who was suing by his next friend, the second plaintiff; his father. The accident occurred when the first plaintiff was returning from school.

[4] Evidence was adduced for the plaintiffs, while the defendant who was wholly paralysed was unable to attend court, but has applied and was allowed by the trial court to tender the defendant's police report at p 8 of the agreed bundle of documents under s 73A of the Evidence Act 1950.

[5] It was the specific finding of the trial court that there was no clear evidence as to how the accident had actually occurred. SP1, one Noor Laila, only saw the first plaintiff and the defendant's car after the accident, but not the actual accident itself.

[6] The first plaintiff testified that at the material time, he was riding a bicycle but was unable to say how the accident had actually occurred. He could not remember where he was before he crossed the road or whether or not he was indeed crossing the road at all.

[7] It was the finding of the trial court that the evidence adduced for the plaintiff may well have supported the defendant's version as stated in the latter's police report to the effect that the first plaintiff has suddenly crossed the road, as a result of which the collision took place.

[8] The trial court found that the first plaintiff has failed to exercise due care to ensure his own safety, while the defendant was equally to blame when he came to the zebra crossing on the road near the school with school children crossing there.

SUBMISSION FOR PLAINTIFFS

[9] Mr Francis Soh, learned counsel for the plaintiffs, submitted that the evidence adduced for the first plaintiff has established that the accident occurred on the zebra crossing just outside the school, and that the defendant did not slow down, as he was unable to control his vehicle. He added that this was a case of absolute liability, and cited *Kayser v London Passenger Transport Board* [1950] 1 All ER 231; *Abraham v Choo Jit Fung & Anor* [1996] 1 MLJ 97 (FC); *Tan Chwee Lian v Lee Ban Soon* [1963] MLJ 149; *Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor* [1994] 2 MLJ 497; *Tham Yew Heng & Anor v Chong Toh Cheng* [1985] 1 MLJ 408; *Mohamad Safuan bin Wasidin & Anor v Mohd Ridhuan bin Ahmad (an infant)* [1994] 2 MLJ 187.

[10] It was contended that in relation to special damages, there was no rebuttal evidence by the defendant, and cited *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377; *Ngooi Kim Chong v Subramaniam a/l Maruthan & Anor* [1990] 1 CLJ 799; *Lee Tai Kau v Rajanderan Manickam* [1995] 4 MLJ 163; *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 (CA); p 5 of *McGregor on Damages* (15th Ed, 1998); *Cunningham v Harrison & Anor* [1973] 1 QB 943; *Liong Thoo v Sawiyah &* Ors [1982] 1 MLJ 286; and *Ong Jin Choon v Lim Hin Hock & Anor* [1988] 3 MLJ 137 to support his contention that the trial court has erred as the gratuitous payment by the second plaintiffs employer should not affect the plaintiffs' right to a sum of money as a result of the accident.

CONTENTION FOR DEFENDANT

[11] Encik Azizan Abd Malik, learned counsel for the defendant, contended that the finding of fact by the trial court should not be disturbed, relying on *Samar binte Mansor v Mustafa Kamarul Ariffin* [1974] 2 MLJ 71 (FC).

[12] He added that the apportionment of liability was correct, citing *Jeremiah v Lee Yew Kwai* [1966] 1 MLJ 59 (FC); *Goh Leng Kwan v Teng Swee Lin & Ors* [1974] 2 MLJ 5; *Chong Sooi Chuen v Yuen Lai Chun* [1988] 2 MLJ 443; *Lai Yew Seong v Chan Kim Sang* [1987] 1 MLJ 403; *Chan Peng Fook v Kan Pak Lee* [1974] 2 MLJ 197; and *Jag Singh (an infant) v Toong Foong Omnibus Co Ltd* [1962] MLJ 78; *Tey Siew Goh v Tay Tian Soo*[1965]31 MLJ 21.

[13] On the issue of special damages, it was argued for the defendant that the plaintiffs are not entitled thereto as it has been paid by the second plaintiff's employer and not by the second plaintiff personally. The defendant relied on *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295.

DECISION OF THE COURT

Contributory negligence

[14] At this juncture, it is necessary and appropriate to set out the meaning of the word 'negligence' as used in the expression 'contributory negligence'. It does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong: per Seah SCJ (as he then was) in *Lai Yew Seong v Chan Kim Sang*, at p 404E right, per Parke B in *Bridge v Grand Junction Ry* (1838) 150 ER 1134; Lord Maugham in *R v Southern Canada Power Co* [1937] 3 All ER 923, at p 930 and *Nance v British Columbia Electric Ry* [1951] AC 601, at p 611.

[15] Seah SCJ in the same case added that the test of contributory negligence is based entirely on the conduct of the plaintiff in that particular accident or case.

[16] On the aforesaid specific finding of facts by the trial court in this particular case, I am of the view that the correct test has been applied. Indeed support for the decision of the trial court may be found in *Samar binte Mansor*, where appellant (plaintiff) was knocked down by a motorcycle ridden by the respondent (defendant) when she was crossing a road from behind a bus. The majority judgment of the Federal Court held that the defendant was negligent and that the plaintiff was partly negligent. The culpability of the defendant was apportioned at 50%.

[17] In *Chan Peng Fook v Kan Pak Lee*, the defendant had in fact seen the plaintiff walking in an unsteady manner about three feet from the edge of the road. The defendant who was about 40–50 yards away did not slow down until the plaintiff was 10–15ft away. He swerved to the left when the plaintiff was crossing the road and was near the centre of the road. Hashim Yeop A Sani J (later CJ (Malaya)) apportioned liability thus: defendant 2/3 and plaintiff 1/3.

[18] In *Jag Singh (an infant)*, Suffian J (later LP) held, inter alia, that the test of what is contributory negligence is the same as in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportionate to the age of the child.

[19] In *Tey Siew Goh v Tay Tian Soo*, the plaintiff, a 12-year-old girl, had alighted from a bus and was running across the road when she was knocked down by a lorry. Gill J (later CJ (Malaya)) held that the plaintiff was equally guilty of negligence as she did not look to either direction before she ran across the road, and that although she was an infant she could be guilty of contributory negligence which was assessed at 50%.

[20] Where the issue is purely a question of deciding what is the right apportionment, if any, of blame on two persons when they are suddenly involved in a traffic emergency, it would not be possible for the appellate court such as the Privy Council to intervene and substitute a fresh finding instead of that which was found by the learned trial judge: per Lord Pearce in *Jeremiah*.

[21] On the facts and the law, I am of the view that the conclusion arrived at by the trial court on the evidence adduced before it pertaining to the apportionment of liability is fair, reasonable, justified and correct.

Special damages

[22] The meaning of the expression 'special damages' has been judicially explained by Mohamed Azmi J (later SCJ) in delivering the judgment of the Federal Court in *Sam Wun Hoon v Kader Ibramshah*, as consisting of out-of-pocket expenses, such as hospital bills, and the burden of proof based on the balance of probabilities in the evidence lies on the plaintiff.

[23] Since these hospital bills have already been fully settled by the second plaintiffs employer directly and the second plaintiff paid nothing for these items, they did not form part of the plaintiffs' out of pocket expenses and so the trial court is correct in dismissing the plaintiffs' claim for special

damages, because to allow the special damages would result in a duplicity of claim by the plaintiffs or to award special damages which were not actually incurred by the plaintiffs.

Interest

[24] As far as I can ascertain, there did not appear to have been any submission pertaining to the plaintiffs' appeal against interest, although the notice of appeal did expressly state this as an item appealed against. However, the memorandum of appeal did not state any ground of appeal in relation thereto. In the circumstances, I hold that the plaintiffs have abandoned the appeal against the interest awarded by the trial court.

CONCLUSION

[25] On the foregoing grounds, I affirm the whole of the decision of the trial court and dismiss the plaintiffs' appeal with costs.

Plaintiffs' appeal dismissed with costs. Decision of sessions court judge affirmed.

Reported by Ezatul Zuria Azhari